THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

Bankruptcy No.: 04-60106

In Re:

Daniel S. Miller,

Debtor.

In Proceeding Under
Chapter 11

RESPONSE TO UNSECURED CREDITORS' MOTION TO CONVERT OR DISMISS

The Debtor, by the undersigned attorney, submits this Response to the Unsecured Creditors Committee's Motion to Convert or Dismiss.

1. A proceeding to dismiss a case or convert a case to another chapter is governed by 11 USC §1112 and FRBP 9014. A motion to dismiss or a motion to convert a case is deemed a motion either to dismiss or to convert, whichever is in the best interest of creditors and the estate. L.R. 1017-2(a). A case may be converted to a Chapter 7 case if the debtor may be a debtor under Chapter 7. 11 USC §1112(f). The Debtor is not a farmer so conversion to a Chapter 7 is possible.

2. Cause for dismissal or conversion includes the following:

   a. There is a continuing loss to or diminution of the debtor's estate and absence of a reasonable likelihood of rehabilitation. 11 U.S.C. §1112(b)(1); *In re Minn. Alpha Foundation*, 122 B.R. 89 (Bkrptcy.D.Minn. 1990);

b. The debtor is unable to effectuate a plan. 11 U.S.C. §1112(b)(2); *Hall* v. *Diminution*, 887 F.2d 1041 (10th Cir. 1989); *In re Fossum*, 764 F.2d 520 (8th Cir. 1985); *Moody* v. *Security Pacific Business Credit, Inc.*, 85 B.R. 319 (W.D. Pa. 1988); *In re Economy Cab & Tool Co., Inc.*, 44 B.R. 721, 725 (Bkrptcy.D.Minn. 1984);

c. There has been an unreasonable delay by the debtor which is prejudicial to the interest of creditors. 11 U.S.C. §1112(b)(3); *Moody* v. *Security Pacific Business Credit, Inc.*, 85 B.R. 319 (W.D. Pa. 1988);

3. Cause for conversion or dismissal is not limited to the reasons expressed in §1112(b)(e). 11 U.S.C. 102(3); *Moody* v. *Security Pac. Business Credit, Inc.*, 85 B.R. 319, 352-53 (W.D. Pa. 1988). This case should not be dismissed, as set forth below.

A. CONTINUING LOSS

There is no monetary loss to this Bankruptcy Estate if this case is not converted or dismissed. The Debtor is taking the steps necessary to liquidate the vast majority of the Debtor's assets. The Debtor has received Court approval to sell the real estate consisting of the grain site as well as the vast majority of the Debtor's equipment. The Debtor has also liquidated the grain assets and is in the process of examining claims to determine ownership interests in the grain assets. The Debtor is taking all necessary steps to preserve the assets for the benefit of the creditors. There is absolutely no detriment to the creditors as a result of the Debtor being in Chapter 11 as opposed to Chapter 7.

The Debtor intends to file a liquidating Plan in the immediate future. The Unsecured Creditor's Committee wants this matter converted to a Chapter 7, but there is no legal or factual basis for the Court to do so. Congress has specifically authorized liquidating plans under a Chapter 11. *See 11 U.S.C. Section 1123(b)(4) and 11 U.S.C.* Section 1123(a)(5)(B) permits the sale of all or any part of the property of the Estate. The Debtor and other creditors

may file a liquidating plan.

As the Court stated in *In re: Haugen, 1990 WL 1239788 (Bankr. D. N.D.):*

> Although seemingly at odds with spirit and objective of Chapter 11, substantial liquidation within Chapter 11 and the fact that a Chapter 11 debtor may contemplate filing a liquidating plan is not in and of itself grounds for conversation or dismissal. Both Sections 1123(b)(4) and 1129(a)(11) provide the Debtor authority for liquidation within the context of Chapter 11. See also In re: Jartan Inc., 866 F 2d 859 (7th Cir 1984); In re: GPA Technical Consultants Inc., 106 B.R. 139 (Bky. S.D. Ohio 1989); In re: Schlanger, 91 B.R. 834 (Bky. M.D. I. R. 1988). Indeed creditors themselves may file liquidating plans in a Chapter 11 case. *Matter of Button Hook Cattle Co. Inc., 747 F2d 483 (8th Cir. 1989).*
>
> Liquidation within the context of a Chapter 11 is not on its face an indicia of bad faith or creditor evasion, but can be looked upon as a good faith admission by a debtor that continued operations as a going concern is not possible. Recognition of this fact does not necessarily require the filing of or conversation to a Chapter 7, since as most commentators have noted, "A Chapter 7 proceeding is generally not the most practical, efficient, expeditious or most effective manner of liquidating estates."
>
> There is no presumption that a Chapter 7 Trustee is better at liquidating property than the

Debtor under a Chapter 11. As set forth in a Liquidating Plan of Reorganization 56AMBKRLJ

29:

> The emphasis in favor of allowing the debtor to remain in possession and monitoring of the proceeding by one or more creditor committee is realistic. Congress has now recognized that the greatest control over and input into the proceeding should be exercised by those having an actual financial stake in the outcome. Generally, a Trustee's motivation will not exceed those of the debtor and his creditors; and similarly, the efficiency and effectiveness of recoveries effected in straight bankruptcies do not exceed that which may be accomplished in a Chapter 11 reorganization . . .
>
> However, when it becomes obvious that an orderly liquidation is the only alternative available for the Debtor, the Code permits such action, thereby precluding arguments over the format which liquidation must follow; and it allows the control of liquidation to be balanced appropriately between the debtor and his creditors without the interposition of a Court-appointed fiduciary, such as a Trustee, unless clearly necessary.
>
> There is no good reason to convert this case to a Chapter 7. There has been no showing

that the costs in a Chapter 11 will exceed the costs in a Chapter 7. In fact, the Debtor asserts the reverse is true. If conversion is ordered, the services of Special Counsel will have to be terminated as the firm representing the Debtor will no longer be disinterested. The process of determining grain claims will come to halt and all of the work of Special Counsel will have to be replicated. Further, there is no showing that a Chapter 7 Trustee activation will result in a larger dividend to the unsecured creditors or that the liquidation will occur at a faster rate. Chapter 7 Trustees usually make one distribution when the case is finally administered. The Debtor's Plan will allow for periodic disbursements based upon when the funds are available for distribution. All of the Debtor's actions under the liquidation will be subject to Court supervision. The Debtor has tried to work with the unsecured creditor Committee and has complied with all reasonable requests for information and the liquidation process. Chapter 7 Trustee's fees in the present case would be substantial and unnecessary to incur. There is no reasonable justification to convert this case to a Chapter 7 at law, and no cause has been shown by the Unsecured Creditors' Committee. As set forth above, liquidating plans are authorized under the Code and the Court should permit the Debtor to finish what he started.

Liquidating plans can contain provisions for liquidation of the assets by the Debtor or an independent Trustee. There is no reason to convert this matter to a Chapter 7. The creditors are protected by the confirmation process. In addition, if the Debtor acts in a fashion that is in violation of the Code, a Trustee can be ordered by the Court.

With regard to specific grounds which the Committee alleges to be grounds, the Debtors responds as follows:

a. The Debtor does intend to file a Liquidation Plan. Moreover, that action is

permissible under the Code as set forth above.

b. The Debtor intends to file a Plan that pays the creditors as much as they would receive under a Chapter 7. This is all that is necessary to achieve confirmation.

c. The alleged transfer of a partial interest in his homestead to his female friend on June 16, 2001, is insufficient to constitute cause for conversion. There is no actionable claim regarding this transaction as it involves a transfer of exempt property. It is not fraudulent as to creditors under the Fraudulent Conveyance Act, and is not actionable under the Code. If the Committee wants to pursue such a claim, Special Counsel could be appointed or the committee could seek permission from the Court to pursue such a claim. However, assets of the estate should not be spent on futile claims.

d. The Debtor needs to file his income tax returns. The same person who performs the accounting for the grain assets can be retained to file the taxes. The Estate will also need to file returns. The same accountant can provide these services. It makes sense for the Debtor to obtain these services and finish all matters regarding the taxes.

e. Rod and Nancy Rinderknecht were responsible to provide bookkeeping and accounting services to the business. After the case was filed, the undersigned discussed terminating their services. I was dissuaded from recommending the Debtor terminate them at the request of the Unsecured Creditors' Committee and Michael Arnold of the State Department of Agriculture. The Debtor will obtain services of an accountant to provide the necessary bookkeeping services.

f. Mike Dove has acted as special counsel for the Debtor. Mr. Dove and his firm has had contacts with the Debtor and has an attorney-client relationship. Absent consent of the Debtor, it is possible that Mr. Dove and his firm could not continue to act on behalf of the Estate in a Chapter 7. Further, Mr. Dove's firm would not be disinterested as required by the Code. This would be an issue for the Court in the event this matter was converted and if the Chapter 7 Trustee would seek to retain Mr. Dove. If Mr. Dove was precluded from representing the Estate, his work would have to be duplicated at great expense to the Unsecured Creditors.

g. The Debtor's Plan calls for payment in cash of the value of the non-exempt retained assets. If this amount were not paid, the Plan provides for the appointment of a Receiver and liquidation of these assets. The Creditors will receive a distribution by the Debtor's Liquidation Plan as fast or faster than under a Chapter 7.

h. The Debtor's monthly statements disclose the income and the expenses that have been paid during the administration of the estate. Obviously, the Debtor can and has explained how the money was utilized and generated.

i. There is no basis for the assertion that the Creditors would receive more in a Chapter 7 than under a Liquidation Plan. As set forth above, the Chapter 7 Trustee will charge percentage fees, which will come out of the pocket of the unsecured creditors. This fee would be computed as follows:

Total Assets Administered:	$1,556,439.00
25% of first $5,000 =	1,250.00
10% of next $45,000 =	4,500.00
5% of next $955,000 =	47,500.00
3% of next $556,439 =	16,693.00
	$69,943.00

The Debtor would not receive these payments and all of these funds would come out of the Creditors' pockets. Other Administrative funds would also be saved because the Debtor would be providing the labor or services in certain circumstances.

In other words, cause does not exist to convert this case to Chapter 7.

B. THE DEBTOR CAN EFFECTUATE A PLAN

There is a reasonable likelihood of reorganization and the Debtor can formulate a Plan. As set forth above, a liquidation plan is specifically authorized by the Code. The Debtor must show there is a "reasonable possibility of a successful reorganization within a reasonable time" *Timbers* v. *Inwood Forest*, 489 U.S. 365 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). This case was filed on February 3, 2004, and converted to a Chapter 11 on February 19, 2004. The First Meeting of Creditors was held on April 6, 2004. A Creditor's Committee has been formed and it is represented by an attorney. The Debtor is taking steps to formulate a Plan. The Debtor's exclusive period to file a Plan would expire on or about June 18, 2004. The Debtor will be able to meet this deadline and expects that a Plan will be filed prior to June 8, 2004, the date of the hearing of this Motion.

The Debtor believes that a feasible Plan of Reorganization can be formulated. At the present time, the Debtor envisions a Plan which provides that substantially all of the assets will be sold and held for payment to unsecured creditors after secured creditors are paid. The grain assets and the net proceeds less secured claim from the liquidation of the Tilden Grain Site and the personal property will be paid to Unsecured Creditors on the effective date. The Debtor expects to pay the value of the property he retains (less exemptions and secured claims) within one year of confirmation. A failure to make the payment would result in an appointment of a Receiver appointed under Minnesota Statutes who would liquidate the remaining non-exempt assets. A feasible plan is possible. There is no legal basis to convert this case at the present time.

UNREASONABLE DELAY

Finally, there has been no unreasonable delay by the Debtor which is prejudicial to the interests of the creditors. The Debtor has acted in a forthright manner and performed all of its duties as a Chapter 11 Debtor. The Debtor will file a Plan of Reorganization in a timely fashion.

CONCLUSION

At the hearing, the Debtor will offer testimony of the Debtor. Evidentiary material may include preliminary cash flows prepared for the Debtor regarding the feasibility of a Plan, the projected operating supplies, income and expense sheets which have been filed with the U. S. Trustee and the Schedules herein.

Therefore, the unsecured creditor's Motion should be denied.

Dated this 28th day of May, 2004.

FLUEGEL, HELSETH, MCLAUGHLIN,
ANDERSON & BRUTLAG, CHARTERED

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF BIG STONE)

Judeen L. Fuller, being first duly sworn upon oath deposes and says, that in said County and State, on the 28th day of May, 2004, she served the within Response to Unsecured Creditors' Motion to Convert or Dismiss upon:

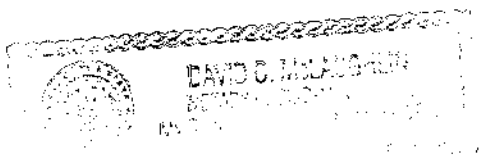
SEE ATTACHED LIST

by then and there depositing a copy thereof properly enveloped, with postage prepaid and addressed to the last known address, at the Post Office in Ortonville, Minnesota, where affiant in this action, resides.

Judeen L. Fuller

Subscribed and sworn to me
this 28th day of May, 2004.

Notary Public



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